IN THE

Supreme Court of the United States

October Term, 1966

No. 1255

WHITEHOUSE TRUCKING, INC.,
Appellant,

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

APPELLANT'S BRIEF OPPOSING MOTIONS TO AFFIRM

Three motions to affirm the judgment appealed from herein have been filed on the ground that no substantial question is presented by this appeal. In essence, the single question raised by this appeal is whether the Commission may disregard the unambiguous language of a certificate issued pursuant to the Interstate Commerce Act on the basis of subsequently adopted Commission policy.

In addition to the reasons set out in Appellant's Jurisdictional Statement, the substantiality of the question presented is further indicated by the fact that the arguments advanced in support of the Motions To Affirm exhibit two major deficiencies.

I.

There is a complete absence from the arguments in support of the Motions of any meaningful discussion of the fact that the unambiguous language of the certificate involved cannot as a matter of plain English be squared with the Commission's "interpretation" thereof. The common weakness which underlies each of the various contentions advanced by the movants is the implicit conclusion that the language of the certificate is consistent with the Commission's "interpretation". There is a complete absence from the Commission's order and the underlying record of any basis either in ordinary English usage or in special trade usage for the Commission's "interpretation" of the language of the certificate. Once the uncontroverted record fact that the Commission has disregarded the plain English meaning of the certificate involved is recognized, it is apparent that a substantial issue is presented. The various contentions advanced in support of the Motions To Affirm miss the point because they are predicated on an erroneous premise which assumes the answer to the very question that is presented.

II.

It is asserted in support of the Motions To Affirm that the judgment appealed from is clearly supported by a definite Commission policy against granting certificates which authorize transportation of both prefabricated buildings and other specified prefabricated commodities which come under the broader generic description "building materials". It is not explained how any such a policy could derogate from the plain and unambiguous grant of a certificate. Moreover, there is no evidence in the record or the Commission's order of any such policy. While the terms "prefabricated buildings" and "building materials" have

been employed by the Commission for many years and obviously refer to distinctly different commodities, there has not heretofore been any announced Commission policy against combining in a single certificate authority to transport prefabricated buildings with authority to transport other prefabricated commodities.* If the Commission had intended to grant authority only to transport "prefabricated buildings and component parts thereof" it would have granted a certificate stating precisely that. The Commission's action in granting more is at odds with the contention that there existed a Commission policy against doing so. In sum, the movants' reliance upon a purported Commission policy which is not established by the record to justify modification of the plain language of a certificate indicates that this appeal, indeed, raises a substantial question under the Interstate Commerce Act which has far reaching implications with respect to the maintenance of stability in the transportation industry and preservation of the statutory scheme embodied in the Act.**

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* The combination of authority to transport commodities such as prefabricated buildings with authority to transport other commodities falling within the generic classification "building materials" in a single certificate is not unprecedented. See *e.g. Pre-Fab Transit Co. v. United States*, 13 *Federal Carriers Cases*, Paragraph 81,215 (S.D. Ill. 1958) (not officially reported).

** The Motions To Affirm contain various contentions and factual statements which Appellant disputes, but which are appropriate for discussion in a definitive brief on the merits rather than within the limited confines of this brief.

CONCLUSION

The Motions To Affirm the judgment of the District Court should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WHITEHOUSE TRUCKING, INC. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

No. 1255. Decided June 12, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.